IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 154

ANDERSON NATIONAL BANK, SUING ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, *Appellants,*

vs.

H. CLYDE REEVES, INDIVIDUALLY AND AS COMMISSIONER OF REVENUE OF THE STATE OF KENTUCKY, ETC., ET AL., *Appellees.*

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF AMICI CURIAE

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PRELIMINARY STATEMENT

This brief is submitted on behalf of Northwestern National Bank of Minneapolis, First National Bank of Minneapolis, The First National Bank of Saint Paul, First Wisconsin National Bank of Milwaukee and Marine National Exchange Bank of Milwaukee, *amici curiae*, each of which is interested in the determination of this case because of the fact that the legislatures of Minnesota and Wisconsin have enacted legislation similar to the Kentucky statute here involved (Laws of Minnesota 1943, chapter 620, and *Wisconsin Statutes 1941*, Section 220.25).

The validity of such legislation is of interest to national

banks generally in view of the fact that statutes similar in character to the Kentucky statute have been enacted in many states, including California, Pennsylvania, Michigan, Wisconsin and Minnesota. Since the decision of this court in *First National Bank of San Jose vs. California*, 262 U. S. 366, no statute similar to the Kentucky statute under consideration in this case has been enforced against national banks.

ARGUMENT

Point I.

An Analysis of the Holding of the Court of Appeals of Kentucky in the Instant Case and the Holding of This Court in First National Bank of San Jose vs. California.

In its opinion in the instant case the Court of Appeals of Kentucky fully recognizes the validity of the general rules of law upon which *First National Bank of San Jose vs. California*, 262 U. S. 366, rests. The Kentucky court says:

> "The question of validity of the Act as applied to national banks must be approached in the light of the limitations applicable to state legislation affecting such institutions. National banks are amenable to state laws as are other institutions if such laws do not interfere with their functions in such manner as to conflict with the general objects and purposes of the National Banking Act. *First National Bank of Elizabethtown vs. Conn.*, 187 Ky. 151, 219 S. W. 175; *McClellan vs. Chipman*, 164 U. S. 347, 41 L. ed. 461; *First National Bank of San Jose vs. Calif.*, 262 U. S. 366, 67 L. ed. 1030. * * * But, as said in *First National Bank of San Jose vs. Calif.*, *supra*, 'any attempt by a state to define their duties or control the conduct of their affairs is void whenever it conflicts with the laws of the United States or frustrates the purposes of the national legislation or impairs the efficiency of the bank to discharge the duties for which it was created. *Davis vs. Elmira Sav. Bank*, 161 U. S. 275, 40 L. ed. 700, 16 Sup. Ct. Rep. 502.'"

We contend, however, that the Kentucky court has misconstrued the holding of the *San Jose case*. In its opinion the Kentucky court concludes:

> "Thus it seems that the California statutes were held invalid as to national banks because they were deemed by the court to be *escheat* statutes confiscating the deposits solely by reason of *dormancy*."

This conclusion is based upon the following sentence appearing in the *San Jose case*:

> "The success of almost all commercial banks depends upon their ability to obtain loans from depositors, and these might well hesitate to subject their funds to possible confiscation."

A careful reading of the opinion in the *San Jose case* will demonstrate that what this court actually held was that:

> "Plainly, no state may prohibit national banks from accepting deposits or directly impair their efficiency in that regard. And we think, under circumstances like those here revealed, a state may not dissolve contracts of deposit even after twenty years, and require national banks to pay to it the amounts then due; the settled principles stated above oppose such power." (262 U. S. 366, 369.)

In other words, this court held that a state may not dissolve contracts of deposit between a national bank and its depositors even after twenty years of dormancy. It did not hold that confiscation of property was the vice of the California statute as the Kentucky court seems to think. That confiscation was not the vice of the California act is shown by the fact that in *Security Savings Bank vs. California*, 263 U. S. 282, this court upheld the validity of the California act in a proceeding involving a state bank. If confiscation results when the state takes deposits from a national bank, confiscation also results when the state takes them from a state bank. The holding of the *San Jose case* is that a state cannot take deposits from a national bank—whether it pur-

ports to acquire the title of the depositor or to take the money as custodian—because the act of the state would constitute an interference with the operation of the bank, and such act would be in conflict with the general objects and purposes of legislation of Congress dealing with the creation and maintenance of national banks as Federal instrumentalities.

In speaking of confiscation in the *San Jose case* the court undoubtedly meant that the act which made deposits

> "subject to seizure by the state where the bank happened to be located"

was so inimical to the interests of depositors that it would deter them from loaning money to the bank and therefore prevent its successful operation. This is the only reasonable interpretation of the statement made by the court.

A brief consideration of the Kentucky act demonstrates that it operates to dissolve the deposit agreement between the depositor and the bank and that it is even more inimical to the interests of depositors than the California act.

Kentucky Revised Statutes 393.010 and 393.060 to 393.990, inclusive, which are printed in the appendix to this brief, may be summarized as follows:

1. K. R. S. 393.090 provides that demand deposits are presumed abandoned after being inactive for a period of *ten years*.

2. K. R. S. 393.110 requires all banks to report annually to the Department of Revenue all property held by them presumed to be abandoned, such report to include the name of the owner, his last known address, the amount and kind of property and such other information as the Department may require. The sheriff is required to post a copy of this report on the courthouse door. This is the only notice required to be given to the property owner. Thereafter between November

1 and November 15 of each year each bank must turn over to the Department of Revenue all property so reported.

3. K. R. S. 393.130 provides that any person transferring property to the Department of Revenue under the provisions of the act is relieved from liability to the owner.

4. K. R. S. 393.230 provides that the Commissioner of Revenue may institute proceedings at any time after the state receives the property to establish conclusively that the property was actually abandoned or that the owner has died and that there is no person entitled to it.

5. K. R. S. 393.140 provides that after conclusion of the proceeding authorized by K. R. S. 393.230 any person who was not served and who did not appear and whose claim was not considered by the court may file a claim with the Department of Revenue within five years. (The California act had a similar provision. See *Security Sav. Bank vs. California*, 263 U. S. 282, 285.)

The Kentucky act therefore operates to dissolve the deposit contract after *ten years* of inactivity and requires the bank to pay to the state the amount then due the depositor. Such dissolution of contract occurs prior to the institution of any action and without any determination that the depositor has died and that no heirs or legatees have succeeded to his interest. Surely the Kentucky act "attempts to qualify in an unusual way agreements between national banks and their customers long understood to arise when the former receive deposits under their plainly granted powers," and brings about one of the evils which the court in the following statement recognized as imminent if states were permitted to legislate on this subject:

"If California may thus interfere other states may do likewise; and, instead of twenty years, varying limitations may be prescribed,—three years perhaps, or five, or ten, or fifteen. We cannot conclude that Congress intended to permit such results."

San Jose case, 262 U. S. 366, 370.

Moreover, the Kentucky act provides for the determination of actual abandonment, following which recovery is permitted only to a claimant who files a claim within five years and who was in no sense a party to the proceeding. *All right to the deposit may therefore be lost in fifteen years.* Can it be contended that the Kentucky act would be any less a deterrent to the receipt by a bank of loans from a depositor than the California act? We submit that the vice of the California act is greatly enhanced in the Kentucky act.

In this connection it is of interest to note that appellees contend that the Kentucky act is intended for the benefit of the depositor and such is the construction placed upon it by the Kentucky court. Actually, however, the depositor is not benefited. For the reasons hereafter enumerated the act is detrimental to the rights of the depositor.

1. Under the terms of the act the depositor, instead of being able to obtain his deposit from the bank on demand, must file a claim therefor with the Department of Revenue of the State of Kentucky and must thereupon within fifteen days publish a notice in a newspaper of general circulation in the county in which the property was held before being transferred to the state (K. R. S. 393.140), and the Commissioner of Revenue is then directed to hear evidence to determine the merits of the claim (K. R. S. 393.150). It is common knowledge that these dormant deposits are usually small in amount and the imposition of such procedural requirements with the attendant expense will effectively prevent

the recovery of many of these small deposits by their owners.

2. If the deposits are taken by the state the depositor loses the protection afforded by Federal Deposit Insurance Corporation, a Federal instrumentality through which Congress has provided insurance for all deposits in all national banks within the United States up to an amount of $5,000 for each depositor (Act of August 23, 1935, c. 614, 49 Stat. 684; Title 12, U. S. C., §264). So long, therefore, as the deposit remains in a national bank the depositor may obtain the deposit on demand, without inconvenience or expense, and so long as he chooses to leave the deposit in the bank, he has the best possible protection—the insurance protection afforded him by the laws of the United States. It can, therefore, fairly be assumed that the depositor would prefer that his deposit remain in the bank subject at all times to his order, rather than that the deposit be appropriated by the state, thereby placing upon him the burden and expense of recovering it.

3. Under the terms of the act the depositor may lose the deposit entirely after a period of approximately fifteen years from the time the deposit became inactive. The state may take the money from the bank after the deposit has been inactive for ten years. Thereafter the state may institute a proceeding to establish conclusively that the money has been actually abandoned. Presumably the state may obtain an adjudication of actual abandonment without personal service on the depositor, and thereafter the depositor will lose all right of recovery from the state unless he files his claim with the Department of Revenue within five years (K. R. S. 393.140).

Clearly the depositor is in a worse position than if his money remained on deposit with the bank. There is no basis whatsoever upon which it can be contended that the act is beneficial to him. A more realistic characterization of the act would be that it is a revenue measure through which the state expects to receive for its own use a substantial amount of additional revenue.

We submit that the Kentucky court erred in its construction of the *San Jose case*. The operation of the Kentucky statute cannot be distinguished from the operation of the California statute. This court has held that a state cannot dissolve the deposit contract between a national bank and its customer and take the deposit because such action is in conflict with the objects and purposes of the legislation of Congress. The instant case must be decided in accordance with that principle.

Point II.

The San Jose Case Is Sound in Principle, and Is in Accord With Other Decisions of This Court.

In order that the importance of this case may be fully understood, the early history of banking in the United States must be considered. We believe the members of the court are sufficiently informed on this subject so that we need do no more than briefly summarize this early history:

From the beginning of our history as a nation, jurisdiction over banking was the subject of a long and bitter controversy between the federalists and the advocates of states rights. The latter contended that each of the states should have its own independent banking system and the federalists supported the establishment of the Bank of the United States. Throughout the period of this controversy the United States and its citizens suffered. There was no ade-

quate supervision of banks or bankers, speculation and inflation were rampant, bank failures were common, there was no adequate depositary for Federal funds and there was no adequate instrumentality for the transfer of funds from one section of the country to another.

Since the passage of the National Bank Act (Rev. Stat., §5133, *et seq.*, U. S. C., Title 12, §21, *et seqs.*) national banks throughout the country have been created and have carried on their operations under a uniform system of law and their existence and operation have been protected by this court. Under this protection banking facilities have grown, expanded and have been greatly strengthened. The National Bank Act has been amended and improved from time to time until today it provides the most complete, efficient and satisfactory system of banking which this country or any other country has ever had.

The *San Jose case* is one case in a long line of cases in which this court has refused to reopen the door to state interference with the operation of national banks. We respectfully submit that this court should protect the policy which has existed so long and worked so satisfactorily and that it should not now reopen the door to permit these ancient controversies concerning jurisdiction over national banks again to become rampant throughout this country.

Among the powers conferred upon national banks are the power to enter into contracts, to exercise all such incidental powers as shall be necessary to carry on the business of banking, and, specifically, the power to receive deposits (Rev. Stats., §5136, U. S. C., Title 12, §24).

Every consideration which motivated the court in reaching its conclusion in the *San Jose case* applies with equal force today. In the period of twenty years since this court held that Congress did not intend to permit a state to take inactive deposits from a national bank, Congress has not acted

to expand the field of state action or to indicate in any way that a state would be permitted to take such deposits. On the contrary, since the decision in the *San Jose case* Congress has created *Federal Deposit Insurance Corporation* (Act of Aug. 23, 1935, c. 614, 49 Stat. 684, 12 U. S. C., §264), through which Congress has provided insurance for the deposit of every depositor in every national bank in the United States. Can it now be argued that Congress intended to permit the states to provide protection for deposits in national banks by providing their own plan of insurance for such deposits or by taking the deposits from the banks? Surely the action of the state in taking inactive deposits from a bank for the alleged protection of depositors is more clearly outside the scope of permissible state action today than at the time the court in the *San Jose case* held that Congress did not intend to permit such action.

It is submitted that the court in the *San Jose case* could properly have reached no other conclusion. The setting aside of the contract between the bank and its depositor is a *real* interference with the activities of the bank. The statute in question qualified in an unusual way the contract between the depositor and the bank. It undertook to impose a new limitation upon the contract which was not within the contemplation of the parties. This argument is today of greater force than at the time the court rendered its decision because today banks and depositors have for twenty years relied upon the ruling in the *San Jose case*.

If a limitation of twenty years (or ten years in the instant case) should be put upon the period during which a national bank may retain inactive deposits and thereafter the depositor must undertake to recover from the state and incur the attendant expense, not only are the funds which the bank has available for use in carrying out its functions diminished, but it is extremely probable that the flow of de-

posits into the bank will be reduced because depositors will not welcome the prospect of having to proceed against the state to recover their money after a period of twenty years or ten years or some such lesser period as some other state may fix. This is a matter of greater concern to national banks than to other banks for the reason that the larger banks are as a rule national banks and their deposits are drawn from depositors who are residents of many states other than the state in which the particular bank carries on its business. These depositors instead of being able to rely upon the uniform federal laws regulating the affairs of national banks in this respect would be subject to the varying limitations of those states within which they deposited money in national banks.

The authorities which are cited in the opinion in the *San Jose case* indicate that the court had ample precedent for its decision. The examination which we have made of the prior decisions cited indicates that the court did not misconstrue or misquote these opinions. The fact that the court has referred to the *San Jose case* with approval in the following cases:

Security Savings Bank vs. California, 263 U. S. 282;

National City Bank vs. Philippine Islands, 302 U. S. 651;

Starr, Attorney General, vs. O'Connor, Comptroller of the Currency, 118 Fed. (2d) 541 (C. C. A.), Certiorari denied, 314 U. S. 695;

and that no statute similar in character to the act there involved has since been applied to deposits in a national bank are proof of the fact that the decision is not inconsistent with other decisions both prior and subsequent to it.

The State of Minnesota *amicus curiae* in its brief (page 5) in which the State of Wisconsin joins, contends that *National Bank vs. Commonwealth*, 76 U. S. (9 Wall.) 353, was

entirely overlooked by this court in the *San Jose case*. This case is the foundation of the argument made by the State of Minnesota. In fact, however, the brief of the State of California in the *San Jose case* cited and relied heavily upon *National Bank vs. Commonwealth*, *supra*. The failure of this court to mention it in its opinion in the *San Jose case* can be due only to the fact that it cited those cases which it regarded as the controlling precedents after having carefully considered the briefs and arguments of counsel and the cases cited to it.

In addition to *National Bank vs. Commonwealth*, the brief of the State of California cited *McClellan vs. Chipman*, 164 U. S. 347; *Provident Institution for Savings vs. Malone*, 221 U. S. 660; and *Waitè vs. Dowley*, 94 U. S. 527, all of which are cited in the brief of the State of Minnesota.

The State of Minnesota in its brief (page 8) further contends that the court in the *San Jose case* proceeded upon the theory that the act there in question violated rights of both the depositor and the bank, and that the case is not in harmony with *Provident Institution for Savings vs. Malone*, *supra*; and *Security Savings Bank vs. State of California*, *supra*.

We find nothing in the opinion of this court in the *San Jose case* which furnishes support to the argument of the State of Minnesota. The decision is squarely on the point that the act conflicted with the general objects and purposes of the legislation of Congress. The brief of the State of California cited *Provident Institution for Savings vs. Malone*, *supra*, as authority for the power of a state to take inactive or unclaimed deposits from savings banks. Moreover, this court in *Security Savings Bank vs. State of California*, *supra*, referred to the *San Jose case* as authority for the proposition that a state could not take deposits in a national bank if unclaimed for twenty years. It seems to

us therefore that there is no basis for contending that the court in any way based its decision upon the rights of depositors, or that it proceeded on an erroneous theory in regard to rights of depositors.

Unquestionably there are respects in which national banks are subject to state legislation, but such legislation must be of such a character that it does not conflict with the general object and purpose of Congressional legislation. A national bank is subject to the reasonable exercise of the police power of a state. A probate court of a state can adjudicate the title to a deposit owned by a decedent. Such a deposit is subject to garnishment in a state court in a suit against the depositor.

In like manner, a national bank may be required to advance the amount of taxes levied by a state against the stockholders on their shares in the bank (*National Bank vs. Commonwealth*, 76 U. S. (9 Wall.) 353). A tax on the use of safety deposit vaults, which tax is on the customer, may be collected from the bank (*Colorado National Bank of Denver vs. Bedford*, 310 U. S. 41). A national bank may be required to furnish to public officials in a state a list of its shareholders and the number of their shares (*Waite vs. Dowley*, 94 U. S. 527). So also, a statute forbidding the giving of a preference by the transfer of property in the case of insolvency of the transferer has been held applicable to a transfer of property to a national bank (*McClellan vs. Chipman*, 164 U. S. 347).

These are illustrations of the principle that there are respects in which national banks and their operations may properly be subjected to the impact of state laws. But the impact is remote and insubstantial; it does not strike at the roots. The impact of the statute here in issue is quite different; it is aimed at and reaches the fundamental contract rights which serve as the foundation upon which the

business of banking ultimately rests, and so pervasive an attack cannot be regarded as other than in opposition to plain Congressional intent, at least until Congress otherwise declares. It is no answer to say that the difference is one of degree only; as this court has many times pointed out, there are "fields of the law where differences in degree produce ultimate differences in kind" and this is one of them; "drawing the line" in such a field is a "recurrent difficulty." See *Harrison vs. Schaffner*, 312 U. S. 579, 583.

The instant case falls into that category of which *Easton vs. Iowa*, 188 U. S. 220, cited by the court in the *San Jose case* is an example. In that case the plaintiff in error, the president of a national bank, was tried and found guilty of violating an Iowa statute prohibiting an officer of a bank from receiving a deposit knowing that the bank was insolvent. Sentence had been imposed under the criminal penalty provision of the Iowa statute. The Federal statutes imposed no penalty for fraudulently receiving deposits. This court, however, pointing out the provisions of law relating to national banks stated:

> "It thus appears that Congress has provided a symmetrical and complete scheme for the banks to be organized under the provisions of the statute" (p. 231).

In answer to the claim that the Iowa statute benefited national banks by requiring a higher degree of diligence on the part of their officers, the court said:

> "But we are unable to perceive that Congress intended to leave the field open for the states to attempt to promote the welfare and stability of national banks by direct legislation. If they had such power it would have to be exercised and limited by their own discretion, and confusion would necessaril, result from control possessed and exercised by two independent authorities" (pp. 231, 232).

The court concluded:

> "Our conclusions, upon principle and authority, are

that Congress, having power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control the exercise of their operations; that Congress has directly dealt with the subject of insolvency of such banks by giving control to the Secretary of the Treasury and the Comptroller of the Currency, who are authorized to suspend the operations of the banks and appoint receivers thereof when they become insolvent, or when they fail to make good any impairment of capital; *that full and adequate provisions have been made for the protection of creditors of such institutions by requiring frequent reports to be made of their condition; and by the power of visitation by Federal officers; that it is not competent for state legislatures to interfere, whether with hostile or friendly intentions, with national banks or their officers in the exercise of the powers bestowed upon them by the general government.*" (Italics ours.) (p. 238.)

In the instant case, Congress having provided that a national bank may receive deposits, can it be assumed that Congress intended to leave to the states the determination of the manner in which the banks shall dispose of those deposits? Is it consistent with the objects and purposes of Congressional legislation to give to the states the power to say when the nationally given right to accept deposits shall end? It is submitted that the court in the *San Jose case* properly held that Congress did not intend to permit the application to national banks of legislation such as the state act there in question; that the act was in conflict with the objects and purposes of Congressional legislation; and that the same and additional considerations today compel adherence to the principle of that case.

Point III.

The Protection of Depositors of National Banks Is a Subject Upon Which Congress Has Legislated and It Is Not a Proper Subject for State Legislation.

The Court of Appeals of Kentucky held that the Kentucky Act was intended for the protection of depositors. We do not concede that such is its purpose. Appellant contends that the act affords the depositor no protection, and as we have pointed out, the act in fact subjects him to inconvenience, expense and serious risk of loss. Nevertheless, since the Court of Appeals of Kentucky in the decision below held that the act was enacted for the benefit of depositors, it is proper to consider whether Kentucky can legislate for the protection of depositors in a national bank. The Kentucky court said:

> "The good faith of the Legislature cannot be questioned and it is to be assumed that the Act was for the protection of the depositors as well as for the benefit of the state. That this is a justifiable assumption is clearly revealed in the provision giving the depositor (and this, of course, includes his legal representatives) the right, without limit of time, to make a claim and receive a return of the deposit provided there has not been a judicial determination of actual abandonment—and even after such judicial determination five years is given for the same purpose to any person who was not actually served with notice and did not appear in the proceedings." (170 S. W. (2d) 350, 352.)

It is our contention that protection of depositors of national banks has been provided through the operation of the laws of the United States, to which we shall refer, and that the State of Kentucky is therefore not permitted to legislate on this subject, and that, moreover, the Kentucky statutes here in question are in conflict with the general plan and operation of the laws of the United States.

This court has given explicit recognition to the fact that Federal legislation has provided a complete banking system and that the laws relating thereto are designed for the protection of depositors.

In *Deitrick vs. Greaney*, 309 U. S. 190, the court said:

> "The National Bank Act constitutes 'by itself a complete system for the establishment and government of National Banks.' *Cook County Nat. Bank vs. United States*, 107 U. S. 445, 448, 27 L. ed. 537, 538, 2 S. Ct. 561. *In addition to the sections of the Act conferring on national banking associations the authority to conduct a public banking business the Act contains numerous provisions designed for the protection of the bank's depositors and other creditors.* It establishes minimum requirements for the amount of capital with which a bank may begin business, *Rev. Stats.*, §5138, 12 U. S. C. A., §51, and makes special provisions for securing the payment into the bank of the authorized capital, *Rev. Stats.*, §§5140, 5141, 12 U. S. C. A., §§53, 54. It prohibits the purchase by a bank of its own shares of stock and their retention when purchased, *Rev. Stats.*, §5201, 12 U. S. C. A., §83. Impairment of capital of an association through its withdrawal by payment of dividends or otherwise is prohibited. *Rev. Stats.*, §5204, 12 U. S. C. A., §56. Any bank whose capital has become impaired is required under direction of the Comptroller to make up the deficiency by assessment of its shareholders and in the event of its failure to do so a receiver may be appointed to wind up its business. *Rev. Stats.*, §5205, 12 U. S. C. A., §55.
>
> "To insure performance of these duties and as a safeguard to creditors and the public, violation of the provisions of the Act by any director or officer of the bank or by any person aiding or abetting him, is made a criminal offense, *Rev. Stats.*, §5209, 12 U. S. C. A., §592, and in the event of such a violation, the association may be required to forfeit all its rights and privileges, *Rev. Stats.*, §5239, 12 U. S. C. A., §93. Further, by *Rev. Stats.*, §5240, 12 U. S. C. A., §§481, 484, the Comptroller of the Currency is required to appoint examiners who shall examine the affairs of every bank at least twice in

each calendar year with power to administer oaths and examine officers and agents of the bank under oath and who 'shall make a full and detailed report' of the bank to him. By *Rev. Stats.*, §5211, 12 U. S. C. A., §161, every association is required to make the Comptroller of the Currency not less than three reports each year exhibiting in detail and under appropriate heads the resources and liabilities of the association, and the Comptroller is given power to call for special reports whenever, in his judgment, the same are necessary in order to obtain a full and complete knowledge of the condition of the reporting bank." (Italics ours.)

In addition to the details of the comprehensive legislative plan referred to by the court, Congress has created Federal Deposit Insurance Corporation (Act of August 23, 1935, c. 614, 49 Stat. 684, 12 U. S. C., §264). Federal Deposit Insurance Corporation insures all deposits in all national banks within the United States up to a limit of $5,000 for each depositor. This insurance is mandatory for national banks and the Act permits state banks to become members of Federal Deposit Insurance Corporation and eligible to insurance upon certain terms.

In view of the comprehensive Federal legislation which the court characterizes a "complete system for the establishment and government of national banks" and the specific provisions of Federal laws providing protection for the depositors of national banks, is the field now open to state legislation such as the Kentucky statute in question in this case?

The Kentucky statute is said to be for the protection of depositors—in other words, the state of Kentucky is undertaking to protect the depositors from loss. But that is also the purpose of Federal legislation in providing for periodic examination of banks, the furnishing of reports to the Comptroller of Currency, the prohibition against the purchase by a bank of its own shares, the impairment of the capital

of the bank and in the creation of the Federal Deposit Insurance Corporation, which relates specifically to deposits and provides insurance which is payable directly to depositors. All of these are protective measures intended to protect depositors and to insure the stability of national banks.

A bank cannot exist and carry on banking operations without deposits. Therefore, in protecting these deposits Congress is also providing for the continued existence of national banks. In spite of these provisions for the protection of national banks and their deposits the state of Kentucky is in effect saying to the depositors of appellant and other national banks in Kentucky, "This state will protect your deposits and its plan of protection is to take the deposits from the banks if you do not claim them in ten years." It should be noted that the state does not undertake to find the depositor so that he himself may claim his property, but it merely proposes to take the deposit.

We have, therefore, two conflicting methods of protection: One is the method proposed by Congress of making the bank a safe depository so that it will attract depositors since a large amount of deposits is needed to carry on successfully the operation of its business; the other, the method of the state of Kentucky, is to take the deposits away from the bank and let the depositor recover them from the state if he is willing to incur the expense and inconvenience necessary to do so. Are these two types of protection conflicting? To ask the question is to answer it. The two methods are utterly and completely in conflict,—one resulting in taking deposits from a bank, and the other in attracting them to a bank.

It is inconceivable that Congress having undertaken by numerous legislative acts to provide protection for the depositors of national banks intended to leave the field open to such state legislation, the effect of which is in a substan-

tial measure to take away from the banks the benefit conferred upon them by the operation of the Federal laws. The conclusion of this argument may be stated by paraphrasing the closing paragraph of the opinion in *Easton vs. Iowa, supra:* Congress having directly dealt with the subject of protection for depositors in national banks and having provided insurance for those deposits, full and adequate provision has been made for the protection of such creditors; and it is not competent for state legislatures to interfere, regardless of their intention, with the operation of national banks in the exercise of the powers conferred upon them by Congress.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals of Kentucky should be reversed.

Respectfully submitted,

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APPENDIX

Kentucky Revised Statutes.

CHAPTER 393

ESCHEATS

393.010 (1605a; 1610) CONSTRUCTION OF CHAPTER.

(1) As used in this chapter, unless the context requires otherwise:

(a) "Claim" means to demand payment or surrender of property from the person whose duty it is to pay the claimant, or surrender to him the property involved;

(b) "Commissioner" means the Commissioner of Revenue;

(c) "Department" means the Department of Revenue; and

(d) "Person" means any individual, state or national bank, partnership, joint stock company, business, trust, association, corporation, or other form of business, enterprise, including a receiver, trustee or liquidating agent.

(2) This chapter does not apply to bonds of counties, cities, school districts or other tax-levying subdivisions of this state.

393.020 (1606) PROPERTY SUBJECT TO ESCHEAT.

If any property having a situs in this state has been devised or bequeathed to any person and is not claimed by that person or by his heirs, distributees or devisees within eight years after the death of the testator, or if the owner of any property having a situs in this state dies without heirs or distributees entitled to it and without disposing of it by will, it shall vest in the state, subject to all legal and equitable demands. Also, any property abandoned by the owner, except a perfect title to a corporeal hereditament, shall vest in the state, subject to all legal and equitable demands. Any property that vests in the state under this section shall be liquidated, and the proceeds, less costs, fees and expenses incidental to all legal proceedings of the liquidation shall be paid to the department.

393.030 (1607) DISPOSITION OF PROPERTY SUBJECT TO ESCHEAT.

(1) The personal representatives of a person, any part of whose property is not distributed by will, and who died without heirs or distributees entitled to it shall settle their accounts within one year after qualifying, and pay to the department the proceeds of all personal property, first deducting the proper legal liabilities of the estate.

(2) If the whole personal property cannot be settled and the accounts closed within one year, the settlement as far as practicable, shall then be made and the proceeds paid to the department, and the residue shall be settled and paid as soon thereafter as can be properly done.

(3) The personal representative shall take possession of the real property of the decedent not disposed of by his will, and rent it out from year to year until it is otherwise legally disposed of, and pay the net proceeds to the department.

(4) The personal representative shall also make out and transmit to the department a description of the quantity, quality, and estimate value of the real property and its probable annual profits.

393.040 (1608) PROCEDURE IF LEGACY OR DEVISE IS NOT CLAIMED.

If any devisee or legatee, or his heir, devisee or distributee, has failed for eight years to claim his legacy or devise, the personal representative of the testator, or other person possessing it shall, after deducting the legal liabilities thereon, pay and deliver it, and the net profits from it to the department.

393.050 (1609) PRESUMPTION OF DEATH AFTER SEVEN YEARS; DISPOSITION OF PROPERTY.

When a person owning any property having a situs in this state is not known to be living for seven successive years, and neither he nor his heirs, devisees or distributees can be located or proved to have been living for seven successive years, he shall be presumed to have died without heirs, devisees or distributees, and his property shall be liquidated and the proceeds, less costs incident to the liqui-

dation and any legal proceedings, and the liabilities which have been properly claimed and approved against it, shall be paid to the department.

393.060 (1610) DEPOSITS IN BANK OR TRUST COMPANY PAYABLE ON DEMAND; WHEN PRESUMED ABANDONED.

Any deposit (legal, beneficial, equitable or otherwise) payable on demand in any bank or trust company in this state, together with the interest thereon shall be presumed abandoned unless the owner has, within ten successive years next preceding the date as of which reports are required by KRS 393.110:

(1) Negotiated in writing with the bank or trust company concerning it;

(2) Been credited with interest on the passbook or certificate of deposit on his request;

(3) Had a transfer, disposition of interest or other transaction noted of record in the books or records of the bank or trust company; or

(4) Increased or decreased the amount of the deposit.

393.070 (1610) DEPOSITS NOT PAYABLE ON DEMAND; WHEN PRESUMED ABANDONED.

Any deposit (legal, beneficial, equitable or otherwise) other than those payable on demand in any bank or trust company in this state, together with the interest thereon, shall be presumed abandoned unless the owner has, within twenty-five successive years next preceding the date as of which reports are required by KRS 393.110:

(1) Negotiated in writing with the bank or trust company concerning it;

(2) Been credited with interest on the passbook or certificate of deposit on his request;

(3) Had a transfer, disposition of interest or other transaction noted of record in the books or records of the bank or trust company; or

(4) Increased or decreased the amount of the deposit.

393.080 (1610) DEPOSITS FOR SECURITY; WHEN PRESUMED ABANDONED.

Any deposit of money, stocks, bonds or other credits made to secure payment for services rendered or to be rendered, or to guarantee the performance of services or duties, or to protect against damage or harm, and the increments thereof, shall be presumed abandoned unless claimed by the person entitled thereto within ten years after the occurrence of the event that would obligate the holder or depository to return it or its equivalent.

393.090 (1610) INTANGIBLE PERSONAL PROPERTY HELD FOR ANOTHER; BENEFITS ON ANY INSTRUMENT; WHEN PRESUMED ABANDONED.

All dividends, stocks, bonds, money, credits and claims for money and credits, and all intangible personal property, and the increments of any of them, held in this state by any person for the benefit of another shall be presumed abandoned unless claimed by the beneficiary or person entitled thereto within ten years from the time the holder, trustee, debtor, or other responsible person became obligated to return them or their equivalent to the proper owner or claimant. If the increments or benefits payable on any instrument are not claimed within the time prescribed in this section, the instrument or evidence of the debt or obligation shall likewise be presumed abandoned.

393.100 (1610) PROPERTY PAID INTO COURT; WHEN PRESUMED ABANDONED.

Any property paid into any court of this state for distribution, and the increments thereof, shall be presumed abandoned if not claimed within five years after the date of payment into court, or as soon after the five-year period as all claims filed in connection with it have been disallowed or settled by the court.

393.110 (1611) HOLDERS OF ABANDONED PROPERTY TO REPORT TO DEPARTMENT; POSTING OF NOTICES; DUTY TO SURRENDER PROPERTY TO DEPARTMENT; RIGHTS OF ACTION.

(1) It shall be the duty of all state and National banks, trust companies, or other persons, and courts of this Commonwealth or the agents thereof, whether holding estates or property as bailee, depository, debtor, trustee, executor, liquidator, administrator, distributor, receiver, or in any other capacity coming within the purview of KRS 393.060 to 393.100, to report annually to the department as of July 1, all property held by them declared by this chapter to be presumed abandoned. The report shall be filed in the offices of the department on or before September 1 of each year for the preceding July 1, and shall give the name of the owner, his last known address, the amount and kind of property, and such other information as the department may require for the administration of this chapter. The report shall be made in duplicate; the original shall be retained by the department, and the copy shall be mailed to the sheriff of the county where the property is located or held. It shall be the duty of the sheriff to post said copy on the courthouse door or the courthouse bulletin board. The sheriff shall immediately certify in writing to the department the date when said copy was posted. Said copy must be posted on or before October 1 of the year when it is made, and shall be constructive notice to all interested parties and shall be in addition to any other notice provided by statute or existing as a matter of law.

(2) Any person who has made a report of any estate or property presumed abandoned, as required by this chapter, shall, between November 1 and November 15 of each year, turn over to the department all property so reported; but if the person making the report or the owner of the property shall certify to the department by sworn statement that any or all of the statutory conditions necessary to create a presumption of abandonment no longer exist or never did exist, or shall certify the existence of any fact or circumstance which has a substantial tendency to rebut such presumption, then, the person reporting or holding the property shall not be required to turn the property over to

the department except on order of court. No person shall be required to surrender any property on a presumption of abandonment to the department if the period of time provided by any statute of limitation applicable to the owner's rights as against the holder has expired unless the court orders him to do so. If a person files an action in court claiming any property which has been reported under the provisions of this chapter, the person reporting or holding such property shall be under no duty while any such action is pending to turn the property over to the department, but shall have the duty of notifying the department of the pendency of such action.

(3) The person reporting or holding the property or any claimant thereof shall always have the right to a judicial determination of his rights under this chapter and nothing therein shall be construed otherwise; and the Commonwealth may institute an action to recover such property as is presumed abandoned whether it has been reported or not and may include in one petition all such property within the jurisdiction of the court in which the action is brought provided the property of different persons is set out in separate paragraphs (1942, c. 156, §§1, 2).

393.120 (1612) SALE OF ABANDONED PROPERTY.

Any intangible personal property required by KRS 393.060 to 393.110 to be liquidated so as to permit payment to the department, shall be surrendered to the department and sold by it to the highest bidder at public sale at Frankfort, or in whatever city in the state affords, in its judgment, the most favorable market for the particular property involved. The department may decline the highest bid and reoffer the property for sale if it considers the price offered insufficient. The sale shall be advertised at least one week in advance in a newspaper of general bona fide circulation in the county where the property was found or abandoned, and in the county where the sale is to be made. The sale shall be held at the courthouse door.

393.130 (1613) TRANSFEROR TO DEPARTMENT RELIEVED OF LIABILITY.

Any person who transfers to the department property to which the state is entitled under this chapter shall be relieved of any liability to the owner arising from that transfer. The state shall reimburse any person who cannot be relieved of such liability by this section for all liability to the owner of the property or estate or damage incurred by reason of compliance with this chapter.

393.140 (1614) CLAIM OF INTEREST IN PROPERTY SURRENDERED TO STATE.

(1) Any person claiming an interest in any property paid or surrendered to the state in accordance with KRS 393.020 to 393.050 who was not actually served with notice, and who did not appear, and whose claim was not considered during the action or at the proceedings that resulted in its payment to the state, may, within five years after the judgment, file his claim to it with the department.

(2) Any person claiming an interest in any estate or property paid or surrendered to the state in accordance with KRS 393.060 to 393.120, that was not subsequently adjudged under the procedure set out in KRS 393.230 to have been actually abandoned, or owned by a decedent who had no heir, distributee, devisee or other person entitled under the laws of this state relating to wills, descent and distribution to take the legal or equitable title, may file his claim to it at any time after it was paid to this state.

(3) The claimant shall, within fifteen days after filing any claim permitted under this section, publish notice of the claim in a newspaper of general bona fide circulation in the county in which the property was held before being transferred to the state. If there is no such newspaper, the claimant shall post the notice at the courthouse door and in three other conspicuous places in that county, and shall file proof of publication or posted notice with the department. No such claim shall be allowed until fifteen days after proof of the notice is received by the department at its offices at Frankfort.

"Bona fide circulation" defined, KRS 424.010.

393.150 (1615) COMMISSIONER TO DETERMINE CLAIMS.

The commissioner shall consider any claim or defense permitted to be filed before the department and hear evidence concerning it. If the claimant establishes his claim, the commissioner shall, when the time for appeal or further legal procedure has expired, authorize payment to him of a sum equal to the amount paid into the State Treasury in compliance with this chapter. The decision shall be in writing and shall state the substance of the evidence heard by the commissioner, if a transcript is not kept. The decision shall be a matter of public record.

393.160 (1615) APPEALS FROM DECISION OF COMMISSIONER.

Any person dissatisfied with the decision of the commissioner may, within sixty days, appeal from it to the Franklin circuit court or file an action in that court to vacate the decision. In either event the proceedings shall be de novo, and no transcript of the record before the commissioner shall be required to be kept unless requested by the claimant. In such proceeding the commissioner shall be made a party defendant, and all other persons required by law to be made parties in actions in rem or quasi in rem shall be made parties. Any party adversely affected by the decision of the Franklin circuit court may appeal to the Court of Appeals within sixty days after the judgment. Upon an appeal the state shall not be required to make a supersedeas bond. The provisions of this section relating to the decision of the commissioner and appeals therefrom shall also apply to a decision of the commissioner rendered under authority of KRS 393.110.

393.170 (1616) PROPERTY IN FEDERAL CUSTODY: DETERMINATION OF WHETHER ESCHEAT HAS OCCURRED.

Whenever any property escheated under this chapter by reason of actual abandonment, or death or presumption of death of the owner without leaving any person entitled to take the legal or equitable title under the laws of this

state relating to wills, or descent and distribution, has been deposited with, or in the custody or under the control of, any Federal court in and for any district in this state, or in the custody of any depository, clerk or other officer of such court, or has been surrendered by such court or its officers to the United States Treasury, the circuit court of any county in which such Federal court sits shall have jurisdiction to ascertain whether an escheat has occurred, and to enter a judgment of escheat in favor of the state. This section does not authorize a judgment to require such courts, officers, agents or depositories to pay or surrender funds to this state on a presumption of abandonment as provided in KRS 393.060 to 393.110.

393.180 (1618) PROCEEDINGS INSTITUTED BY COUNTY ATTORNEY ON RELATION OF COMMISSIONER.

Any legal proceeding to enforce KRS 393.020 to 393.050 and to recover any sum due the state thereunder shall be instituted, on the relation of the commissioner, by the county attorney of the county in which any such property is located. The petition and all necessary pleadings shall be sent to the commissioner for his signature and approval. The petition shall be accompanied by an affidavit of the county attorney, stating the facts on which it is based. For all other pleadings, there shall be a statement by the county attorney of the reason for the particular pleading.

393.190 (1618) ASSISTANT ATTORNEY-GENERAL TO AID COUNTY ATTORNEY.

On any action filed by a county attorney under the provisions of this chapter, the assistant Attorney-General provided for in KRS 15.140 shall offer assistance and suggestions to the county attorney in the preparation of the petition or any pleadings, and revise and correct them as he considers necessary, subject to the ultimate approval of the commissioner, when he is required to sign them.

393.200 (1618) COMPENSATION OF COUNTY ATTORNEY; COMMISSIONER MAY PERFORM HIS DUTIES.

If the county attorney performs all the duties imposed upon him by this chapter relating to enforcement of KRS 393.020 to 393.050 he shall be entitled to a fee of fifteen percent of any sum recovered in the proceeding, but shall be limited to five percent on intangible property recovered in excess of one thousand dollars. If the county attorney declines to perform the duties imposed upon him by this chapter, they may be performed by the commissioner, and the county attorney shall not be entitled to any fee. When he considers it to the best interest of the state, the commissioner may institute any action authorized by this chapter to be brought by the county attorney, or join the county attorney in the active prosecution of any such action. The county attorney shall be entitled to his fee in either instance if he does his duty.

Assistant Attorney-General assigned to Department of Revenue, KRS 15.140.

393.210 (1618) PROPERTY IN TWO OR MORE COUNTIES; COMPENSATION OF COUNTY ATTORNEYS.

If the property of a person coming within the purview of KRS 393.020 to 393.050 is located in two or more counties, all the property may be included in one action. The county attorneys of all counties in which such property is located may join in the prosecution of the proceeding. Their fees shall be determined by the amount of money derived from the property located within their respective counties when possible to determine that figure. Otherwise, the courts shall determine their fees by equitable apportionment in accordance with the value of the property located in their respective counties.

393.220 (1618) DISPOSITION OF TANGIBLE PROPERTY DURING PROCEEDING.

Pending the outcome of an action, the court may make such disposition of the land or tangible personal property involved as it considers best from the standpoints of use, rents, interest and profits. If the use of the property is

given to the claimant by the court, he shall be held accountable for returns and profits arising from it if the state is successful in the proceeding.

393.230 (1619) PROCEEDING TO FORCE PAYMENT OF INTANGIBLE PROPERTY; TO ESTABLISH ACTUAL ABANDONMENT.

(1) If any person or the agent of any court refuses to pay or surrender intangible property to the department as provided in KRS 393.060 to 393.110, an equitable proceeding may be brought on the relation of the commissioner to force payment or surrender. All property subject to KRS 393.060 to 393.110 may be listed and included in a single action.

(2) If any intangible property is turned over to the department on presumption of abandonment, in accordance with KRS 393.060 to 393.120, the commissioner may at any subsequent time institute proceedings to establish conclusively that it was actually abandoned, or that the owner has died and there is no person entitled to it.

393.240 (1619) ACTIONS MAY BE JOINED; SHALL BE IN EQUITY.

(1) If any person has property coming within the purview of KRS 393.020 to 393.050, and also of KRS 393.060 to 393.110, the actions required to be brought by the county attorney and the commissioner may be joined, but joinder is not required, and if separate actions are brought, they shall not be considered as coming within the rule against splitting a cause of action. The county attorney is not charged with the duty of enforcing sections KRS 393.060 to 393.120, 393.150 or 393.160.

(2) The procedure for all actions under this chapter shall be filed as equity actions and follow the procedure provided by the Civil Code of Practice, unless otherwise provided in this chapter.

393.250 (1620) EXPENSES, HOW PAID; COUNTY ATTORNEY TO COLLECT JUDGMENTS, DEDUCT FEE.

(1) Any necessary expense required to be paid by the state in administering and enforcing this chapter shall be paid out of appropriations made to the department.

(2) The county attorney shall act as agent of the department for the collection of all judgments recovered in actions prosecuted by him under this chapter. He shall deduct the fee allowed him and promptly remit the remainder to the department with such information relating thereto as the department requires.

393.260 (1621) LIMITATION OF STATE'S ACTION.

Any action brought by the state under this chapter shall be brought within fifteen years from June 12, 1940, or from the time when the cause of action accrued, whichever is the later date.

393.270 (1622) PERSON UNDER DISABILITY, EXTENSION.

Any person under disability affected by this chapter shall have five years after the disability is removed in which to take any action or procedure or make any defense allowed to one sui juris.

393.280 (1622-1) EXAMINATION OF RECORDS; PROMULGATION OF RULES; DELEGATION OF COMMISSIONER'S AUTHORITY.

(1) The department, through its employees, may examine all records of any person where there is reason to believe that there has been or is a failure to report property that should be reported under this chapter.

(2) The commissioner may promulgate any reasonable and necessary rules for the enforcement of this chapter, and govern hearings held before him. He may delegate in writing to any regular employee of the department authority to perform any of the duties imposed on him by this chapter, except the promulgation of rules.

393.290 (1622-1) CIVIL ACTION TO ENFORCE PRODUCTION OF REPORTS, SURRENDER OF PROPERTY.

(1) The department may require the production of reports, or the surrender of property as provided in this chapter by civil action, including an action in the nature of a bill of discovery, in which case the defendant shall pay a penalty equal to ten percent of all amounts that he is ultimately required to surrender. This penalty shall not exceed five hundred dollars.

(2) Any person who in good faith contests the applicability of this chapter to him may be relieved of the threat of any penalty by posting a compliance bond in an amount and of surety sufficient to the court.

393.300 (1623-1) RESTRICTION ON ESCHEAT OF REAL PROPERTY HELD BY LENDING CORPORATION UNDER SUPERVISION.

No person shall institute proceedings to escheat real property the title to which was acquired by any lending corporation in satisfaction of debts previously contracted in the course of its business, or that it purchases under a judgment for any such debt in its favor, if such lending corporation is under the supervision of the Division of Banking of this state, Comptroller of Currency of the United States or any other duly constituted supervising banking authority, state or Federal, without first obtaining the consent of the supervising authority having supervision over that corporation.

393.990 (1622-1) PENALTIES.

Any person who refuses to make any report as required by this chapter shall be fined not less than fifty dollars nor more than two hundred dollars, or imprisoned for not less than thirty days nor more than six months, or both.